No. 98-791

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner,*
AND
J. DANIEL KIMEL, JR, ET. AL.
v.
FLORIDA BOARD OF REGENTS, *Respondents.*

UNITED STATES OF AMERICA, *Petitioner,*
AND
WELLINGTON N. DICKSON, A/K/A "DUKE"
v.
FLORIDA DEPARTMENT OF CORRECTIONS

UNITED STATES OF AMERICA, *Petitioner,*
AND
RODERICK MACPHERSON AND MARVIN NARZ
v.
UNIVERSITY OF MONTEVALLO

On Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

BRIEF OF THE AARP; THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP); ET AL.; AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Additional Amici continued on inside cover)

*LAURIE A. MCCANN
AARP FOUNDATION LITIGATION
MELVIN RADOWITZ
601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for Amici Curiae
*Counsel of Record

36pp

(Additional Amici)

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME); THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA (ATLA); THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND (DREDF); THE EMPLOYMENT LAW CENTER; THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA); NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

LEGISLATIVE HISTORY

MISCELLANEOUS

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SUPREME COURT OF THE UNITED STATES

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BRIEF *AMICI CURIAE*

INTEREST OF THE AMICI CURIAE[1/]

This *amici curiae* brief is submitted on behalf of AARP; the American Association of University Professors (AAUP); the American Federation of State, County and Municipal Employees (AFSCME); the Association of Trial Lawyers of America (ATLA); the Disability Rights

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[1/] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

Education and Defense Fund, Inc. (DREDF); the Employment Law Center; the National Employment Lawyers Association (NELA) and the National Partnership for Women and Families. The statements of interest of *amici* are included in the appendix to this brief.

By written consent of the parties,[2/] *amici curiae* submit this brief in support of Petitioners.

SUMMARY OF THE ARGUMENT

The Eleventh Amendment acts as a jurisdictional bar to private suits brought for damages against the States and state agencies under federal law. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 99 n.8 (1984). Eleventh Amendment immunity is not absolute, however. This Court has articulated a two-part test for determining if Congress has validly abrogated the States' immunity. First, Congress must make its intent to abrogate Eleventh Amendment immunity "unmistakably clear." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Second, Congress must have acted "pursuant to a valid exercise of power" conferred by the Constitution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996), *quoting Green v. Mansour*, 474 U.S. 64, 68 (1985). In *Seminole Tribe*, this Court declared that only the Fourteenth Amendment provides Congress with the authority to abrogate Eleventh Amendment immunity. *Seminole Tribe*, 517 U.S. at 66.

Most recently, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court provided additional guidance for determining whether a statute is "appropriate legislation" under § 5 of the Fourteenth Amendment. In *City of Boerne,* the Court asserted that to be considered "appropriate legislation" under § 5, a statute must be "responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. In addition,

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[2/] Letters of consent from all parties have been filed separately with the Clerk of the Court.

"[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

The ADEA satisfies both of these conditions. First, by amending the ADEA on four separate occasions to either subject the States to liability, or to limit their liability under the Act in some way, Congress unequivocally expressed its intent to abrogate the States' sovereign immunity. Second, the objectives of the 1974 amendments to the ADEA, extending its prohibitions to the States, are wholly consistent with the guarantee of equal protection found in the Fourteenth Amendment. Congress' purpose in extending the ADEA's coverage to the States was to secure equal protection for state government employees by eliminating arbitrary and irrational age classifications and by mandating that state employees be judged based on their ability and not their age. This objective places the 1974 amendment to the ADEA squarely within the reach of the Fourteenth Amendment. Finally, in prohibiting arbitrary age discrimination, Congress narrowly tailored the ADEA to accommodate the unique concerns of the States.

ARGUMENT

I. CONGRESS UNEQUIVOCALLY EXPRESSED ITS INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY IN THE TEXT OF THE ADEA.

"Congress' intent to abrogate the States' immunity from suit must be obvious from `a clear legislative statement.'" *Seminole Tribe*, 517 U.S. at 55 (*citing Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)). On four separate occasions, Congress has clearly and unmistakably expressed its intent to include the States as "employers" under the ADEA and to abrogate their immunity to liability under the Act. These congressional actions substantiate what this Court has already concluded – that "there is no doubt [that] the intent of Congress was[] to

extend the application of the ADEA to the States." *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983).[3/]

As originally enacted, the ADEA protected only private sector employees. *See* Pub. L. No. 90-202, 81 Stat. 602 (1967). In 1974, Congress extended the protections of the ADEA to state and local government employees by amending the definition of "employer" to include "a State or political subdivision of a State or any agency or instrumentality of a State." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (amending 29 U.S.C. § 630(b)(2)), and by changing the definition of "employee" to include "employees subject to the civil service laws of a State government," *id.* § 28(a)(4), 88 Stat. 74 (amending 29 U.S.C. § 630(f)). As "employers" under the ADEA, state or local governments that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1), are liable for legal and equitable relief. 29 U.S.C. §§ 626(b), (c). Thus, "the `threshold fact of congressional authorization' to sue the State as employer is clearly present." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) *quoting Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

In the 1986 amendments to the ADEA,[4/] Congress again made it unmistakably clear that it intends the ADEA to apply to the States. In addition to removing the ADEA's

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[3/] *See also Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) ("The ADEA plainly covers all state employees except those excluded by one of the exceptions."); *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998) ("[T]he ADEA plainly covered state employees...") (dictum).

[4/] Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

age cap,[5/] Congress carved out a narrow exception for firefighters and law enforcement officers employed by state and local governments. As to these employees, § 4(i) of the ADEA provided:

> (i) It shall not be unlawful **for an employer which is a state, a political subdivision of a state, or an interstate agency** to fail or to refuse to hire or to discharge any individual because of such individual's age if such action is taken - (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable state or local law on March 3, 1983, and (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

29 U.S.C. § 623(i) (emphasis added).[6/]

In 1990, Congress enacted the Older Workers Benefit Protection Act (OWBPA)[7/] to restore the ADEA's longstanding prohibition against arbitrary age

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[5/] As originally enacted, the ADEA only protected persons age 40 to 65. In 1978, the Act was amended to raise the age ceiling for nonfederal employees to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(c), 92 Stat. 189.

[6/] This exemption expired December 31, 1993. However, it was permanently reinstated three years later as part of the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 (1996) and recodified as § 4(j), 29 U.S.C. § 623(j).

[7/] Pub. L. 101-433, 104 Stat. 978 (1990).

discrimination in employee benefits.[8/] In the OWBPA, Congress twice spoke to the States as covered "employers" subject to liability for violations of the Act. First, "state and local political subdivisions" were afforded a two-year grace period to comply with the OWBPA if their benefit plans could "be modified only through a change in applicable State or local law." Pub. L. No. 101-433, § 105(c)(1). Second, any state or local government that had to establish a new disability plan in order to comply with the OWBPA was allowed to give its current employees the choice of remaining in the old plan or electing coverage under the new plan. *Id.*, § 105(c)(2). Expressing his support of these accommodations for the States, Senator Mitchell stated:

> Under the [OWBPA], States will need to . . . adjust State employee benefit plans simply to comply with Federal law. The legislation does not preempt State authority to determine the scope or level of State employee benefits . . . The adjustment of State employee benefit plans is left entirely to the States, so long as unfair or arbitrary age discrimination does not occur relative to specific benefits or benefit plans . . . Senator Pryor and Senator Metzenbaum [sponsors of the compromise] have worked diligently to make every reasonable accommodation to State interests in this regard...

136 Cong. Rec. S13604-05 (Sept. 24, 1990).

As recently as 1996, Congress acknowledged the States as subject to the ADEA when it enacted legislation permanently reinstating the exemption that gives state and local governments the right to set mandatory retirement

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[8/] The OWBPA was enacted in response to *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), which permitted employers to deny benefits based on age in certain circumstances. S. Rep. No. 101-263, at 5 (1990).

ages for their public safety officers.[9/] In sum, Congress has repeatedly demonstrated its clear and unequivocal intent to bring the States "within the core group of potential defendants in ADEA actions," *Cooper v. New York State Off. Of Mental Health*, 162 F.3d 770, 776 (2d Cir. 1998), not once, but four times. These "numerous references to the 'State' in the text of [the ADEA]," *Seminole Tribe*, 517 U.S. at 57, combined with sections 626(b)[10/] and (c)[11/] of the ADEA,[12/] "make it undubitable that Congress intended

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[9/] *See infra* note 6.

[10/] Section 626(b) of the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, by providing that the ADEA may "be enforced in accordance with the powers, remedies, and procedures provided in" 29 U.S.C. § 216(b). Section 216(b) states that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," 29 U.S.C. § 216(b). A "public agency" is defined as "the government of a State and any agency of a State". 29 U.S.C. § 203(x).

[11/] Section 626(c) is the ADEA's private enforcement section that allows aggrieved persons to sue for damages, including back pay. "While it is true that § 626(c) is phrased in general terms – 'any person aggrieved' may sue in 'any court of competent jurisdiction' – the combination of the amendments to 'employer' and 'employee' and the availability of private damage actions makes it clear that States are intended to be subject to liability under § 626(c)." *Cooper v. New York State Off. of Mental Health*, 162 F.3d at 776.

[12/] Several federal circuit courts of appeals have found the ADEA's enforcement scheme, including its explicit incorporation of § 216(b) of the FLSA, to be "compelling evidence" of Congressional intent to abrogate the states' sovereign immunity. *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998). *See also Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296, 301 (6th Cir. 1998); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1544 n.3 (10th Cir. 1997) (the

(continued...)

through the Act to abrogate the States' sovereign immunity from suit." *Seminole Tribe*, 517 U.S. at 57. "Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases -- and that degree of explicitness is not required, *Pennsylvania v. Union Gas Co., Dellmuth v. Muth*, (dictum) -- it could not have made its desire to override the states' sovereign immunity clearer." *Davidson v. Bd. of Govs. of State Colleges and Univs.*, 920 F.2d 441, 443 (7th Cir. 1990).[13/]

[12/](...continued)
enforcement provisions which the ADEA now references specifically authorize ADEA suits in federal court."). *But see Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824-25 (8th Cir. 1998); *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1430-33 (11th Cir. 1998).

[13/] Eight out of ten of the federal circuit courts of appeals to have considered the issue concur that the ADEA clearly and unequivocally evidences Congress' intent to abrogate the States' immunity. *See, e.g., Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983) ("the ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate congressional will that Eleventh Amendment immunity be abrogated."); *Cooper v. New York State Office of Mental Health*, 162 F.3d 770, 776 (2d Cir. 1998) ("In light of the explicit statements that States fall within the [ADEA]'s purview, Congress was 'unmistakably clear' in expressing its intent to abrogate state sovereign immunity."); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) ("The [ADEA] simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as "employers."); *Scott v. University of Miss.*, 148 F.3d 493, 499-501 (5th Cir. 1998); *Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296, 301-02 (6th Cir. 1998); *Goshtasby v. Board of Trustees of Univ. of Ill.*, 141 F.3d 761, 766 (7th Cir. 1998); *Keeton v. University of Nevada Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1543-44 (10th Cir. 1997). *But see Humenansky v. Regents of the Univ. of*
(continued...)

II THE ADEA IS AN APPROPRIATE AND PROPORTIONAL EXERCISE OF CONGRESS' SECTION FIVE ENFORCEMENT POWER UNDER THE FOURTEENTH AMENDMENT.

A. The ADEA Was Congress' Response to Pervasive and Arbitrary Age Discrimination Against Older Workers.

"Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propropiety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects'." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 1999 WL 412723, * 8 (U.S. June 23, 1999) (*quoting City of Boerne v. Flores*, 521 U.S. at 525). The underlying conduct at issue here is pervasive and arbitrary age discrimination by state employers.

In enacting the ADEA, Congress acted thoughtfully and circumspectly. "Efforts in Congress to prohibit arbitrary age discrimination date[d] back at least to the 1950's." *EEOC v. Wyoming*, 460 U.S. at 229. As part of the 1964 Civil Rights Act, Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[14/]

The Secretary's Report confirmed that age discrimination in employment was a pervasive and debilitating problem, particularly for those age 45 and

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[13/](...continued)
Minn., 152 F.3d 822, 824-25 (8th Cir. 1998); *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1430-33 (11th Cir. 1998).

[14/] Section 715 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

older.[15] Specifically, the Report "found that a substantial amount of age discrimination in employment did exist and furthermore, that almost all of it was arbitrary."[16] The most telling evidence of the problem was the widespread use of age limits in hiring, which denied workers jobs based on an arbitrary age limit regardless of ability.[17] The Secretary advised Congress that legislation was needed to address the problem:

> The use of [ ] age limits continues despite years of effort to reduce this type of discrimination through studies, information, and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations. The possibility of new **nonstatutory** means of dealing with such arbitrary discrimination has been explored. That area is barren.

The Older American Worker at 21 (emphasis in original).

Subsequently, Congress and the Executive Branch initiated their own intensive investigation of the nature and extent of age discrimination, each holding extensive hearings on proposed legislation dealing with age discrimination in employment. *See EEOC v. Wyoming*, 460 U.S. at 230-31 (listing hearings). The "extensive fact finding undertaken by the Executive Branch and Congress,"

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[15] Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965), reported in Legislative History of the Age Discrimination in Employment Act of 1967 (hereinafter "*The Older American Worker*").

[16] 113 Cong. Rec. 31,254 (Nov. 6, 1967) (statement of Sen. Yarborough).

[17] Approximately half of all private job openings explicitly barred applicants over age 55, and a quarter barred those over age 45. 113 Cong. Rec. 1089-90 (Jan. 23, 1967).

confirmed the findings of the Secretary of Labor. *Id.* In stark contrast to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, which this Court determined lacked modern examples of intentional discrimination, *City of Boerne*, 521 U.S. at 530, when the ADEA was enacted, "the evidence before Congress established that qualified workers were being fired, not hired, and paid less because of their age." *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 771 (7th Cir. 1998); *see also Coger v. Board of Regents*, 154 F.3d 296, 304 (6th Cir. 1998).

The extensive record compiled in the ADEA's legislative history fully supports Congress' detailed findings of a serious and pervasive problem of arbitrary age discrimination against older workers. Specifically Congress found that:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) **the setting of arbitrary age limits** regardless of potential for job performance **has become common practice**, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens

> commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a) (emphasis added). Only after determining that the establishment of "arbitrary age limits" had become "common practice" with devastating consequences for older workers, did Congress move forward with legislation.

The ADEA initially only applied to the private sector and did not address age discrimination by government employers.[18] However, "[i]n 1973, a Senate Committee found this gap in coverage to be serious, and commented that '[t]here is . . . evidence that, like the corporate world, government managers also create an environment where young is somehow better than old.'" *EEOC v. Wyoming*, 460 U.S. at 233 quoting, *Improving the Age Discrimination Law: Hearing Before the Senate Comm. On Aging* 93d Cong., 1st Sess., 14 (1973). In response to this evidence, Congress extended the protections of the ADEA to federal, state, and local government employees "to shield public employees from the invidious effects of age-based discrimination." *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699 (1st Cir. 1983). "Although the legislative history of the 1974 amendment is somewhat sparse, it evidences that 'Congress subsequently established that the[ ] same conditions [that begot the enactment of the ADEA in 1967] existed in the public sector.'" *Scott v. University of Miss.*, 148 F.3d 493, 502 (5th Cir. 1998) (quoting *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 772 (7th Cir. 1998)).

Unlike the passage of the Patent Remedy Act, where "Congress identified no pattern of patent infringement by the States," *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 1999 WL 412723, at *8 (U.S. June 23, 1999), when Congress extended the ADEA to the States, it was responding to:

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[18] *See* Pub. L. No. 90-202, 81 Stat. 602 (1967).

> mounting evidence that employees of . . . State[s] . . . [were] being denied the free choice between productive work or adequate retirement income . . . [and] strong indications that the hiring and firing practices of government units discriminate against the elderly, frequently pressuring them into retiring before their productive days are over . . . [W]hatever the form, the pressures directed against older Government employees constitute flagrant examples of age discrimination in employment, and as such, they should be outlawed . . .

118 Cong. Rec. S7,745-46 (1972) (statement by Sen. Bentsen). Finally, while this Court considered the Patent Remedy Act to be Congress' "response to a handful of instances of state patent infringement," *Florida Prepaid*, 1999 WL 412723, at *11, the States are frequent defendants in ADEA lawsuits,[19] as evidenced by the significant number of cases raising the issue of the States' immunity to ADEA suits prior to the grant of *certiorari* in this case.

B. The Equal Protection Clause Protects Against Arbitrary Age Discrimination by the States.

The purpose of the Equal Protection Clause of the Fourteenth Amendment is "to secure every person within

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[19] Empirical studies directed at public sector employment also demonstrate that age discrimination by state and local governments remains a pervasive problem. *See, e.g.*, I. Phillip Young, *et al.*, *Age Discrimination: Impact of Chronological Age and Perceived Position Demands on Teacher Screening Decisions*, 30 J. Res. & Dev. in Educ. 103, 111 (1997) ("these data indicate that age discrimination at the screening stage of the employment process exist[s] still within the public school setting"); Anne H. Hopkins, *Perceptions of Employment Discrimination in the Public Sector*, 40 Pub. Admin. Rev. 131, 132-133 (1980) (12 percent of all public employees, and 17 percent of public employees over 50 years old, reported age discrimination on the job).

the states' jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352 (1918). This Court's "equal protection jurisprudence is not confined to traditional suspect or quasi-suspect classifications." *Goshtasby*, 141 F.3d at 771; *Coger*, 154 F.3d at 305; *Scott v. University of Miss.*, 148 F.3d 493, 500-501 (5th Cir. 1998). Classifications based on age, while only subject to rational basis review, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), are not beyond the scope of the Fourteenth Amendment. Nor are age classifications inherently improper subjects for legislation under Section 5 of the Fourteenth Amendment.

The rational basis standard, although deferential, is "not a toothless one." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). For example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court, applying the rational basis test, invalidated a zoning ordinance as based upon "an irrational prejudice against the mentally retarded." 473 U.S. at 450.[20/] In *Cleburne*, this Court acknowledged that, "Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination . . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction **arbitrary or irrational**." *Id.* at 446 (emphasis added). Since any legislation that distinguishes on the basis of age must be rationally related to a legitimate governmental purpose, the Equal Protection Clause clearly addresses age discrimination in employment. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

[20/] *See also Zobel v. Williams*, 457 U.S. 55 (1982) (applying rational basis review to strike down a statutory scheme which provided for the distribution of income derived from the state's natural resources to adult citizens in different amounts, depending on the length of time each citizen had resided in the state).

"[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [this Court's] most deferential standard of review." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

The purpose of the ADEA is "to prohibit **arbitrary** age discrimination in employment." 29 U.S.C. § 621(b) (emphasis added). Arbitrary age discrimination is not rational and therefore, violates the Fourteenth Amendment's Equal Protection Clause. As the ADEA is designed to remedy and to prevent arbitrary, i.e., irrational, employment decisions based on age, it enforces the provisions of the Fourteenth Amendment.[21/]

C. The Objectives of the ADEA are the Essence of Equal Protection.

The legislative purpose of the ADEA and of its 1974 amendment are "the very essence of the guarantee of 'equal protection of the laws.'" *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982). Congress' objective in both enacting the ADEA and extending its coverage to the States was to secure equal treatment for older employees based on their ability and not their age.

Title VII is the ADEA's closest legislative parallel. *Id.* at 607. The objectives of the ADEA and Title VII, which indisputably was passed pursuant to § 5 of the Fourteenth Amendment, are identical. Indeed, when Senator Bentsen, the sponsor of the legislation extending the ADEA to the States, first introduced his bill in 1972, he stated, "I believe that the principles underlying the [ ] provisions in the EEOC bill [extending Title VII's coverage

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[21/] Because the ADEA was enacted pursuant to Congress' powers under § 5 of the Fourteenth Amendment, this Court's recent decision in *Alden v. Maine*, 1999 WL 412617 at *31 (U.S. June 23, 1999) that Congress lacks the power under Article I to subject non consenting states to private suits in their own courts, should not impact the ADEA. *Id.* at *32.

to federal, state and local employees] are directly applicable to the Age Discrimination in Employment Act." 118 Cong. Rec. 15,895 (1972).

On more than one occasion, this Court has recognized the shared goals of the ADEA, Title VII, and other employment discrimination statutes. "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace. . . ." *Oscar Meyer & Co. v. Evans,* 441 U.S. 750, 756 (1979).[22/] This Court has clearly expressed its conviction that the ADEA is an integral part of the nation's collective law prohibiting arbitrary employment discrimination:

> The ADEA, enacted in 1967, as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 ed. and Supp. V) (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1988 ed., Supp. V) (disability); the National Labor Relations Act, 29 U.S.C. § 158(a) (union activities); the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex).

McKennon v. Nashville Banner Publ' g Co., 513 U.S. 352, 357 (1995).

[22/] *See also Lorillard v. Pons,* 434 U.S. 575, 584 (1978) ("There are important similarities between [Title VII and the ADEA], . . .both in their aims -- the elimination of discrimination from the workplace -- and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII.") and *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985).

Not only are the ADEA and Title VII themselves strikingly similar, the unlawful behaviors they are intended to combat are also identical. Congress obviously understood that age discrimination was similar to race and other forms of invidious discrimination. As justification for passage of the 1974 amendment, both the House and Senate committee reports specifically cite with approval President Nixon's statement recommending passage of the legislation:

> Discrimination based on age -- what some people call "age-ism" -- can be as great an evil in our society as discrimination based on race or any other characteristic which ignores a person's unique status as an individual and treats him or her as members of some arbitrarily defined group.

H.R. Rep. No. 93-913, at 40 (1974); S. Rep. No. 93-690, at 55 (1974).[23/]

In the words of former congressman Claude Pepper, "Ageism is as odious as racism or sexism."[24/] Ageism[25/] violates the basic democratic principle that each person should be judged on the basis of individual merit rather than

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[23/] *See also EEOC v. Elrod,* 674 F.2d at 606. ("This view of congressional purpose is substantiated by the overall legislative history of the ADEA. Congress saw the original legislation, passed in 1967, as filling a gap in federal anti-discrimination law left open when Title VII was passed in 1964. Enactment of the ADEA thus completed the basic structure of federal protection of equal employment opportunity.").

[24/] 123 Cong. Rec. 27,121 (1977).

[25/] The term "ageism" describes the "deep and profound prejudice against the elderly which is found to some degree in all of us." R.N. Butler, *Why Survive?: Being Old in America* 11 (1975). Butler defines ageism as, "a process of systematic stereotyping of an discrimination against old people because they are old, just as racism and sexism accomplish this with skin color and gender." *Id.,* at 12.

on the basis of group characteristics.[26] Age discrimination, like race discrimination and sex discrimination, results in unfair treatment on the basis of a characteristic -- one which the individual has neither chosen nor has the power to change.[27] "The striking substantive similarity between the [ADEA and Title VII] militates strongly in favor of the conclusion that the identical reservoir of congressional power was the well-spring for both." *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d at 700.[28]

D. The ADEA is Narrowly Tailored to Accommodate the Special Concerns of State Employers.

When Congress enacts legislation to enforce the provisions of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. The ADEA clearly satisfies this standard as Congress carefully crafted the statute to address and remedy the serious problem of age

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[26] E.B. Palmore, *Ageism: Negative and Positive* 7 (1990).

[27] H. Eglit, 3 *Age Discrimination* 1-4 (1986).

[28] No significance can be drawn from the fact that the 1974 amendment to the ADEA was passed along with similar amendments to the FLSA. "[T]he connection of the ADEA amendment to the legislation enacting FLSA amendments was largely fortuitous." *EEOC v. Elrod*, 674 F.2d 601, 610 (7th Cir. 1982). As explained below, Title VII, not the FLSA is the ADEA's "closest legislative parallel." *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700 (1st Cir. 1983); *EEOC v. Elrod*, 694 F.2d at 607. Although the ADEA is a "hybrid" of Title VII and the FLSA, the objectives and substantive prohibitions of the ADEA are nearly identical to Title VII's. Only the ADEA's enforcement procedures and remedies resemble those of the FLSA. *See Lorillard v. Pons*, 434 U.S. 575, 578-79 (1978). Given that the objectives of a statute are determinative in ascertaining whether it was a valid exercise of Congress'§ 5 power, the fact that the ADEA was amended along with the FLSA in 1974 is not pertinent to this Court's determination.

discrimination in this country. Congress tailored the ADEA's legislative scheme to target arbitrary age discrimination while carving out exemptions for those instances where it is rational to make distinctions based on age.

First, "consistent with congressional findings that age discrimination especially affects older workers, [ ] § 621(a)(1)-(3)," *Migneault v. Peck*, 158 F.3d 1131, 1139 (10th Cir. 1998), the ADEA protects only individuals age 40 and over. 29 U.S.C. § 631(a). In contrast, at least nineteen of the state laws that prohibit age discrimination in employment either prohibit age discrimination against individuals age 18 or over or do not specify a minimum age for coverage.[29] "Hence, the ADEA is remedial, . . . because its application is proportional to the conduct, arbitrary age discrimination among older workers, that it seeks to prevent." *Migneault*, 158 F.3d at 1139 *citing City of Boerne*, 521 U.S. at 519.

Second, the ADEA specifically permits any worker, regardless of age, to be fired or disciplined for good cause. *See* 29 U.S.C. § 623(f)(3).[30] In addition:

> in order to insure that employers were permitted to use neutral criteria not directly dependant on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the [ADEA] provided that certain otherwise prohibited employment practices would not be unlawful "where age is a bona fide occupational

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[29] Fair Employment Practices Manual, BNA Labor Relations Reporter, 451:58 - 60 (August, 1997).

[30] Senator Yarborough, one of the sponsors of the bill which became the ADEA, declared, "This bill is to give [older workers] a fair chance, based on their qualifications. It does not give a person a preference because of age, it merely says that if they have equal qualifications, they will have equal treatment." 113 Cong. Rec. 35,056 (1967).

> qualification reasonably necessary to the normal operation of the particular business [BFOQ], or where the differentiation is based on reasonable factors other than age." [RFOA] § 4(f)(1), 29 U.S.C. § 623(f)(1).

EEOC v. Wyoming, 460 U.S. at 233. There is rightfully no BFOQ for race in Title VII; nor is there a provision comparable to the ADEA's reasonable factor other than age (RFOA) provision in Title VII. The presence of these provisions in the ADEA demonstrates the deliberate steps Congress took to ensure that the ADEA was not too "sweeping." *City of Boerne,* 521 U.S. at 532.

In addition, unlike the RFRA, struck down in *City of Boerne,* the ADEA does not impose an onerous test for defending against an alleged violation.[31/] Instead, "the ADEA is narrowly drawn to protect older citizens from arbitrary and capricious action by the State." *Goshtasby*, 141 F.3d at 772; *Coger*, 154 F.3d at 307.

Under the *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), paradigm, after the plaintiff has established a *prima facie* case, the defendant need only assert a legitimate, non- discriminatory reason for its actions. The defendant's burden is one of mere articulation, of adducing evidence. The ultimate burden of persuasion rests with the plaintiff. *Saint Mary's Honor Center v. Hicks,* 509 U.S. 502, 507 (1993). A defendant's reason for terminating a plaintiff can be virtually any non-age discriminatory

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[31/] "The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. . . . Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne,* 521 U.S. at 533-534.

reason.[32/] If defendant articulates a legitimate, nondiscriminatory reason, plaintiff has to prove that the reason proffered is a pretext or not the true reason for the employment action. *Id.* The role of the jury is to weigh the credibility of the articulated reason for the employment action, not whether the reason itself is valid.

There is nothing onerous or intrusive about the utilization of the *McDonnell Douglas* paradigm to a state employer. It is not burdensome to ask a defendant state employer to state what nondiscriminatory reason motivated its employment action. In sum, "[t]he burden the ADEA places upon [the States] unlike RFRA or the Voting Rights Act, does not require 'searching judicial scrutiny,' but is more like a rationality test in forbidding discrimination on the arbitrary grounds of age." *Wichmann v. Board of Trustees of Southern Ill. Univ.*, 1999 WL 366742, at *5 (7th Cir. June 7, 1999) *citing City of Boerne*, 521 U.S. at 534.

Finally, throughout the history of the ADEA, Congress has repeatedly addressed the unique concerns of the States and has taken steps to limit the ADEA's intrusion into state government. "[L]imitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *City of Boerne*, 521 U.S. at 533. For example, as explained above, state and local governments are permitted to establish maximum hiring and mandatory retirement ages for their public safety officers. 29 U.S.C. §

[32/] *See, e.g., O'Connor v. DePaul Univ.*, 123 F. 3d 665, 670 (7th Cir. 1997) ("For purposes of the ADEA, we may not be concerned with whether the decision was right or wrong, fair or unfair, well-considered or precipitous. We must look only at whether the reason was discriminatory. . . ."); *Kralman v. Illinois Dep't of Veterans' Affairs,* 23 F.3d 150, 156 (7th Cir. 1994) ("'[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere.'" *quoting Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

623 (j).[33/] In addition, "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof" is excluded from the ADEA's coverage. 29 U.S.C. § 630(f). This statutory provision provides significant deference to, and protection of, the States' sovereign immunity.

When Congress enacted the OWBPA, it continued to exercise restraint in applying the ADEA's prohibitions to the States. First, although private employers, employment agencies, and labor organizations generally only had 180 days to come into compliance with the amended ADEA, Pub. L. 101-433, § 105(a), state and local governments were given an extra two years to comply with the OWBPA. *Id.*, § 105(c)(1). Second, any state that had to implement a new disability plan in order to comply with the OWBPA, was permitted to give current employees a choice between staying in the old plan and electing coverage under the new plan. *Id.*, § 105(c)(2). These provisions for state and local governments were added as part of a compromise to achieve bipartisan support and passage of the OWBPA. Senator Metzenbaum, one of the OWBPA's sponsors, stated that as a result of the compromise, "State governments are now expressing their view that we have fairly accommodated their concerns." 136 Cong. Rec. S13598 (Sept. 24, 1990).

In sum, as this Court has recognized, although the ADEA "requires the State[s] to achieve its goals in a more individualized and careful manner than would otherwise be the case, . . . it does not require the State[s] to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC v. Wyoming*, 460 U.S. at 239.

[33/] This privilege was allotted to the States despite the fact that a study commissioned by the Secretary of Labor and the Equal Employment Opportunity Commission (EEOC) concluded that "age is a poor predictor of individual capacity and limitation," and that "public safety is seldom at substantial risk from ineffective performance of the single public safety officer." F.J. Landy, *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs, Executive Summary* 13 (1992).

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed. *Amici* urge this Court to rule that Congress abrogated the States' Eleventh Amendment immunity when it extended the ADEA's coverage to reach arbitrary and irrational age discrimination by state government employers.

Respectfully submitted,

*Laurie A. McCann
AARP Foundation Litigation

Melvin Radowitz
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Attorneys for *Amici Curiae*
* Counsel of Record

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APPENDIX

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AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's 33 million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, (ADEA). One of AARP's primary objectives is to strive to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. In pursuit of this objective, AARP has, since 1985, has filed more than 180 *amicus curiae* briefs before this Court and the federal appellate and district courts. AARP has been a constant presence in cases presenting the issue of the constitutionality of the extension of the ADEA to the States. AARP filed *amicus curiae* briefs on this issue in *Cooper v. New York State Off. of Mental Health*, 162 F.3d 770 (2d Cir. 1998); *Young v. Pennsylvania House of Reps.* (stayed pending a decision in *Kimel*); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998); *Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296 (6th Cir. 1998); *Goshtasby v. Board of Trustess of the Univ. of Ill.*, 141 F.3d 761 (7th Cir. 1998); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); and *MacPherson v. University of Montevallo*, 139 F.3d 1426 (11th Cir. 1998)

The American Association of University Professors (AAUP) is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements of higher education, including the ability of professors who work for state universities to seek judicial redress for civil rights violations, such as age discrimination. *See Leftwich v. Harris-Stowe College, 702 F.2d* 686 (8th Cir. 1983) (a case supported by AAUP that involved successful age discrimination suit by tenured professor when control of college was transferred from local to state entity); *see, e.g.,*

On Discrimination, AAUP Policy Documents & Reports (1995 ed.). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP is concerned that holding public entities, such as state universities, immune from the ADEA will impair the ability of professors to protect themselves from age discrimination in the workplace. *See, e.g., Kimel v. State of Florida*, 139 F.3d 1426 (11th Cir. 1998) (consolidating three ADEA cases, two of which involve professors); *Coger v. Board of Trustees of the State of Tennessee*, 154 F.3d 296 (6th Cir. 1998) (ADEA suit brought by 17 faculty members); *Board of Trustees of University of Connecticut v. Davis*, 162 F.3d 770 (2d Cir. 1998) (consolidating two ADEA cases, one of which involved three law school professors). Indeed, two of the three cases in this appeal involve state university professors.

The American Federation of State, County and Municipal Employees AFL-CIO (hereinafter "AFSCME") is a labor union consisting of over 1.3 million members. A large percentage of the AFSCME membership is employed by state governments. As the labor representative for these employees, AFSCME has a substantial interest in all matters related to the judicial enforcement of their ADEA rights.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association. ATLA's approximately 50,000 member attorneys primarily represent plaintiffs in personal injury, civil rights and employment discrimination actions. ATLA has steadfastly supported the fundamental right to seek legal remedies in court as essential to preserving the rights of all Americans. The Court's decision in this case will affect ability of victims of age discrimination to obtain the legal redress that Congress clearly intended."

Disability Rights Education and Defense Fund, Inc. (DREDF) is a national law and policy center dedicated to

protecting and advancing the civil rights of people with disabilities, and securing equal citizenship for all people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform work. Nationally recognized for its expertise in the interpretation of disability civil rights laws, since its founding DREDF has been involved in most disability rights cases heard by the U.S. Supreme Court, and in the legislative process leading up to all major pieces of federal disability rights legislation. In particular, DREDF played a central role in the legislative process leading to the enactment of the Americans with Disabilities Act (ADA).

The Employment Law Center ("ELC") is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters. As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court involving age discrimination include *Oubre v. Entergy Operations, Inc.*, 117 S.Ct. 1466 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996); *McKennon v.*

Nashville Paper Publishing Co., 115 S.Ct. 879 (1995); *and Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). NELA members have brought numerous cases against states under the Age Discrimination in Employment Act (ADEA), and as such, has a compelling interest in ensuring that the goals of the ADEA are protected and fully realized.

The National Partnership for Women and Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance the rights of women in the areas of work and family through litigation of significant cases, public education, and lobbying efforts. The National Partnership has long been concerned about the combined impact of age and gender discrimination, and has published a report, *Employment Discrimination Against Midlife and Older Women: How Do Sex-and-Age Cases Fare in Court?* In addition, the National Partnership led the Family and Medical Leave Coalition, a diverse coalition of more than 250 groups that supported enactment of the FMLA, and continues to monitor FMLA enforcement to ensure that the implementation of the Act is consonant with its purpose. The National Partnership participated as *amicus curiae* in several federal circuit court appeals on a question closely related to the question presented in the present case, to wit.: whether state employees can enjoy the protections of the Family and Medical Leave Act.